



August 13, 2012

*Via US Mail*

Mayor Tom Bates,

Councilmember Linda Maio

Councilmember Laurie Capitelli

Councilmember Kriss Worthington

Councilmember Darryl Moore

Councilmember Jesse Arreguín

Councilmember Susan Wengraf

Councilmember Gordon Wozniak

2134 Martin Luther King Jr. Way  
Berkeley, CA 94704

Councilmember Max Anderson

Re: Adoption of Civil Sidewalks Ballot Measure at July 10 City Council Meeting

Dear Councilmember Worthington:

I am writing on behalf of the American Civil Liberties Union of Northern California to express our concerns about the procedure that the Berkeley City Council used in putting the sit-lie proposal to a vote on July 10, 2012. Specifically, we are troubled that in responding to disruption of its meeting, the Council violated both the Brown Act and its own procedures: it failed to follow the Act's procedures for addressing disruptive behavior and instead calling a recess at which a majority of the Council may have discussed the matter under consideration; and it then held a vote immediately after reconvening even though there were members of both the public and the Council who were on the list to comment on the proposal. As a result of these violations, members of the public and of the Council were denied their rights to speak about this controversial proposal, and the proposal was adopted without the public debate by Councilmembers that is a crucial part of our democracy.

Although we fully appreciate the Council's need to maintain order at its meetings, we believe that the procedures set forth in Brown Act and the Council's rules for dealing with disruption are more than adequate to allow the Council to address such problems. We therefore ask that the Council put this matter back on its agenda for reconsideration in a meeting that respects the Brown Act, the Council's own rules, and the fundamental principles of open government, free speech, and public participation that they, and our California Constitution, are meant to protect.

MICHELLE A. WELSH, CHAIRPERSON | DENNIS MCNALLY, AJAY KRISHNAN, FARAH BRELVI, ALLEN ASCH, VICE CHAIRPERSONS | KENNETH SUGARMAN, SECRETARY/TREASURER  
ABDI SOLTANI, EXECUTIVE DIRECTOR | KELLI EVANS, ASSOCIATE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | SHAYNA GELENOER, ORGANIZING & COMMUNITY ENGAGEMENT DIRECTOR  
LAURA SAPONARA, COMMUNICATIONS DIRECTOR | ALAN SCHLOSSER, LEGAL DIRECTOR | MARGARET C. CROSBY, ELIZABETH GILL, LINDA LYE, JULIA HARUMI MASS, MICHAEL RISHER, JORY STEELE, STAFF ATTORNEYS  
PHYLLIOA BURLINGAME, ALLEN HOPPER, NATASHA MINSKER, NICOLE A. OZER, DIANA TATE VERMEIRE, POLICY DIRECTORS | STEPHEN V. BOMSE, GENERAL COUNSEL

I. Facts

As we understand it, one of the items on the calendar at the July 10, 2012 Berkeley City Council meeting was the addition of the proposed Civil Sidewalks ballot measure to the November 6 ballot. This ballot measure would criminalize sitting on the sidewalk in Berkeley between the hours of 7 AM and 10 PM. The Council took up this topic at approximately 10:30.<sup>1</sup> Council member Arreguin submitted a proposed amendment or revision to the measure at this time, as did Mayor Bates.<sup>2</sup>

Many community advocates attended the meeting, and some 47 people spoke in this section of the agenda against the proposed measure. One person spoke in favor. At approximately 11:43 (the 4:43:03<sup>3</sup> mark from the video that is available online) some members of the public began to sing “We Shall Not Be Moved.” When the singing persisted after calls for order, the Council voted to extend the meeting until 12:30<sup>4</sup> and then recessed. Five of the city council members (Wozniack, Maio, Bates, Moore and Capitelli) gathered in a space outside the City Council chambers, along with the City Manager. Witnesses state that all five members were either listening to or participating in a discussion about how they could bring the resolution to a vote and that at least one of them was sharing a story meant illustrate why the measure was appropriate.

All five City Council members returned to the public space after about ten minutes.<sup>5</sup> Once there, Mayor Bates immediately said that the Council would be moving on the recommendation. Councilmember Maio began to explain her position on the matter but was drowned-out by the singing and apparently stopped; the Mayor then called for a vote, over an objection by Councilmember Worthington that there were still speakers and members on the list and that the Council had not had an opportunity to debate.<sup>6</sup> As the singing continued, the vote on the measure was taken. There was no audible reference to the amendments that had been tendered at the start of the meeting.

The annotated agenda of the meeting on the City’s website states that the Council voted to accept supplemental material on the measure from the Mayor and from Member Arreguin; however,

---

<sup>1</sup> The official video indicates that the meeting began at 7:00 and that the Council took up the sitie matter 3:26:30 into the meeting. City of Berkeley, *July 10 City Council Meeting* available at [http://berkeley.granicus.com/MediaPlayer.php?publish\\_id=900](http://berkeley.granicus.com/MediaPlayer.php?publish_id=900). The meeting may have started a few minutes late, which would move back all of the estimated times by that same amount. The below citations indicate the time after the start of the video.

<sup>2</sup> See *id.* at 3:27 – 3:27:54.

<sup>3</sup> See *id.* at 4:43:03.

<sup>4</sup> See *id.* at 4:43:50 – 4:44:48

<sup>5</sup> See *id.* at 4:53:40.

<sup>6</sup> See *id.* at 4:54:27-4:56:50.

although it indicates that the resolution adopted with the mayor's amendment it does not indicate the status of Councilmember Arreguin's.<sup>7</sup> The annotated agenda also indicates that 65 individuals were on the speakers list.

After the vote Mayor Bates moved to adjourn the meeting and it was adjourned around midnight, well before the extension of time had expired.

## II. The Council's actions violated the Brown Act

In California, "the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies ... shall be open to public scrutiny." Cal. Const. Art. I § 3(b). Thus, California's Brown Act requires local bodies such as the City Council to conduct *all* of their discussions and deliberations about items before them in public unless a specific exception to the open-meeting requirement applies.<sup>8</sup> This strict requirement applies not just to formal meetings but also to any gathering at which a majority of the Council "discuss" "any item" that is under consideration or within the Council's jurisdiction, no matter how informal.<sup>9</sup> All the Act's provisions must be construed "liberally in favor of openness."<sup>10</sup>

Here, a majority of the City Council members were gathered together during the recess, and both the chronology of the events that followed – the immediate call for a vote, without any on-the-record discussion, despite the prior grant of an extension of time until 12:30 – as well as the witness accounts, strongly suggest that those present during this gathering discussed matters relating to the pending resolution. Any such discussion, no matter how brief and even if it did nothing more than confirm support for the measure or address how it could be brought to a vote, would violate the Brown Act.<sup>11</sup> And even if the City Council members did not discuss anything having to do with the substance or procedure of the meeting, the appearance of impropriety that their actions produced can be as corrosive to our democracy as impropriety itself.

While we understand that the Mayor called for a recess and then a quick vote because of the

---

<sup>7</sup> See [http://www.ci.berkeley.ca.us/Clerk/City\\_Council/2012/07Jul/City\\_Council\\_\\_0710-2012\\_%E2%80%93\\_Regular\\_Meeting\\_Annotated\\_Agenda.aspx](http://www.ci.berkeley.ca.us/Clerk/City_Council/2012/07Jul/City_Council__0710-2012_%E2%80%93_Regular_Meeting_Annotated_Agenda.aspx)

<sup>8</sup> Gov't Code §§ 54950, 54953(a).

<sup>9</sup> Gov't Code § 54952.2; see *Frazer v. Dixon Unified School Dist.*, 18 Cal.App.4th 781, 794-96 (1993).

<sup>10</sup> *Shapiro v. Board of Directors of Centre City Development Corp.*, 134 Cal.App.4th 170, 180-81 (2005); see Cal. Const. Art. I § 3(b).

<sup>11</sup> Under the Brown Act, a meeting includes "any congregation of a majority ... [to] discuss or deliberate upon any item" within the body's jurisdiction. Gov't Code § 54952.2. Thus, although the Brown Act may not apply to discussions of such general matters as the calendaring of future meetings (because such discussions would not deal with any particular item), any discussions of a specific item under consideration by the Council falls squarely within the statutory definition and must be public. Note, too, that that statute applies not only to deliberation, but to any discussion of an item.

disruption, the Council's actions failed to follow the Brown Act's established procedure for dealing with such problems. The Act does not authorize either off-the-record meetings or the termination of debate as a response to disruption; instead, it requires that the Council first try to remove individuals who are causing the disturbance, and if that is inadequate, to clear the public from the room but allow the media to remain to observe further public, on-the-record deliberations by any Council member who wishes to be heard:

In the event that any meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting, the members of the legislative body conducting the meeting may order the meeting room cleared and continue in session. Only matters appearing on the agenda may be considered in such a session. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the legislative body from establishing a procedure for readmitting an individual or individuals not responsible for willfully disturbing the orderly conduct of the meeting.

Gov.Code § 54957.9<sup>12</sup>

The Council should have followed this statutory procedure, which would have allowed the Councilmembers to explain their votes for the record, to raise points in opposition or in favor of the measure, and to conduct the vote in an orderly manner that expressly addressed the amendments that had been offered. The procedure that the Council instead employed allowed none of this.

### III. The Council's actions violated its own rules

These actions also violated the City Council's own rules of procedure. City Council's Rules of Procedure state that "Roberts Rules of Order have been adopted by the City Council and apply in all cases except the precedence of motions in Section V.D shall supersede."<sup>13</sup> Robert's Rules recognize that debate is "an essential element in the making of rational decisions"<sup>14</sup> and explicitly protect the right of each member to speak about a measure before a vote: the right of the city council members to debate "cannot be cut off by the chair's putting a question to vote with such rapidity that no member may get the floor... If a vote has been taken or begun quickly and it is found that a member arose and addressed the chair with reasonable promptness ...the

---

<sup>12</sup> Section V(C) of the Council's rules also provide for procedures to maintain decorum.

<sup>13</sup> Section E of the Berkeley City Council, *Rules of Procedure and Order*, CITY OF BERKELEY 18 (June 28, 2011) [http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Level\\_3\\_City\\_Council/Rules%20of%20Procedure%20Booklet.pdf](http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Level_3_City_Council/Rules%20of%20Procedure%20Booklet.pdf)

<sup>14</sup> HENRY M. ROBERT III ET AL, ROBERT'S RULES OF ORDER NEWLY REVISED 385 (11<sup>th</sup> ed. 2011).

vote must be disregarded, the member is entitled to the floor, and debate begins or resumes.”<sup>15</sup> This rule of order was violated when the Mayor brought the matter to a vote without allowing the scheduled speakers to be heard.

An action taken by a deliberative body may be null and void if it has been taken in violation of procedural rules established by local law.<sup>16</sup> The Council, which has the authority to enact local laws, has adopted these rules, and its failure to abide by them may well render its actions void. Further, the violations prevented the Council from engaging the debate that is an essential element of the parliamentary process and also denied individual City Council members their right to speak in debate, which is one of the basic rights of individual members by Robert’s Rules.<sup>17</sup>

#### IV. Conclusion

The Council’s violations of the Brown Act and its own rules curtailed debate and prevented members of the council and of the public from putting their views of the Civil Sidewalks Ballot Measure on the record. The sudden vote on the measure may have led to confusion about what exactly was being approved. And by gathering during a recess and then returning and immediately calling for a vote, despite the prior grant of an extension of time, a majority of the Council at the very least raised the specter that they violated what is perhaps the Brown Act’s most important protection: the requirement that all discussions and deliberations regarding an item under consideration occur in public.

For these reasons, we ask that you put the Civil Sidewalks Ballot Measure back on the agenda, so that the Council may reconsider it under procedures that comply with the Brown Act and the Council’s own rules.

Sincerely,



Michael T. Risher  
Staff Attorney

cc: Zach Cowan  
City Attorney  
2180 Milvia Street 4th Floor,  
Berkeley, CA 94704

---

<sup>15</sup> *Id.* at 387. In other words, “under legitimate parliamentary procedure, there is not ‘gaveling through’ a measure.” *Id.* Although the Rules do provide a procedure for ending debate, the Council this procedure, which can in any event not be employed when, as here, another speaker has the floor. *See id.* § 16.

<sup>16</sup> *See id.* at 343.

<sup>17</sup> *Id.* at 264.